

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DATAMIZE, LLC, a Wyoming  
limited liability corporation,

No C 04-2777 VRW

ORDER

Plaintiff,

v

PLUMTREE SOFTWARE, INC, a  
Delaware corporation; and BEA  
SYSTEMS, INC, a Delaware  
Corporation,

Defendants.

\_\_\_\_\_ /

This action involves a patent dispute between Datamize, LLC ("Datamize"), the patent holder, and Plumtree Software, Incorporated ("Plumtree") over United States Patent No 6,460,040 ("the '040 patent") and United States Patent No 6,654,418 ("the '418 patent"). Plumtree seeks a declaration that these patents are invalid. Previously, the court concluded that it had jurisdiction to make this declaration and that the patents were invalid under the on-sale bar, 35 USC § 102(b). Doc #45. The court of appeals upheld the jurisdictional ruling, but reversed the grant of summary judgment in favor of Plumtree and remanded, noting that "it will be important for the district court to construe the patent claims at issue." Plumtree v Datamize, 473 F2d 1152, 1164 (Fed Cir 2006). In

1 compliance with that directive, the court, after recounting a bit  
2 more of the background, turns to construction of the claims and a  
3 motion for summary judgment by which Plumtree seeks to invalidate  
4 the patents for indefiniteness, 35 USC § 112 ¶2.

5  
6 I

7 A

8 Plumtree is a publicly traded computer software company  
9 located in San Francisco, California. Plumtree develops, markets  
10 and licenses "corporate portal" software. A "corporate portal" is  
11 web-based software that brings together a variety of applications  
12 and information in a comprehensive platform within an organization.  
13 Plumtree's customers use its software to develop their own corporate  
14 Intranet sites, which allow employees to access, manage and search a  
15 variety of information from within and outside of the organization.

16 Datamize is a start-up software company located in  
17 Missoula, Montana. In early 1993, Datamize's single employee, Kevin  
18 Burns, invented the two patents at issue in this case. The '040 and  
19 the '418 patents were entitled "Authoring System for Computer-based  
20 Information Delivery System" and were continuations of Burns's US  
21 Patent No 6,014,137 ("'137 patent"). In December 1994, Burns first  
22 completed a version of his kiosk authoring tool "reduc[ing] to  
23 practice the inventions claimed in the claims of the three patents."  
24 Doc #9, Ex 3 at 78:18-24. The '137, '040 and '418 patents were  
25 issued on January 11, 2000, October 1, 2002, and December 2, 2003,  
26 respectively.

27 The kiosk authoring tool that Burns designed using the  
28 '040 and '418 patents is a "multimedia kiosk authoring system for

1 use in developing and maintaining user interface screens for  
2 multimedia kiosk systems." Id, Exs 1-2. Burns designed the  
3 authoring system to "be used by persons with little or no experience  
4 in the intricate details of computer programming thereby making it  
5 easier for a large number of persons to set up kiosk interface  
6 screens." Doc #30-2, ¶3. The system "accomplishes this by  
7 providing pre-defined building blocks or screen elements (i e, pre-  
8 defined windows, buttons, and images) to be used in constructing an  
9 interface screen." Id. Burns described the invention as "a method  
10 used to build interface screens for a kiosk or computer system."

11 As an example, the patents explain the authoring tool  
12 might be used to create electronic kiosks used at ski resorts to  
13 provide information to customers about ski conditions, local hotels  
14 and restaurants through a touch screen or key pad. The patented  
15 invention is not the kiosk itself, but is the software for, and the  
16 method of, creating the kiosk.

17  
18 B

19 The present litigation is not the first time Datamize and  
20 Plumtree have met on the patent battlefield. The roots of the  
21 present action between Datamize and Plumtree reach back to May 17,  
22 2002. On that date, Datamize filed suit against Plumtree in the  
23 United States Court for the District of Montana in Missoula alleging  
24 infringement of the '137 patent (the "Montana action"). Ever ready  
25 a combatant, Datamize on this same date sent a letter to Plumtree  
26 informing it that:

27 Datamize believes that Plumtree is infringing  
28 the '137 Patent by, among other things,  
providing software enabling the operation of  
portals and kiosks employing customization and

1           personalization features. We also believe that  
2           Plumtree will infringe the claims in the  
3           continuation patent application when it issues  
4           as a patent [the later issued '040 patent].  
5           From the prior communications, it does not  
6           appear that Plumtree has appreciated the  
7           implications of Datamize's patent rights.

8           Datamize's letter further informed Plumtree of the reasons  
9           behind the Montana action: "Because a direct assertion of patent  
10          infringement could subject Datamize to a declaratory judgment action  
11          by Plumtree in an inconvenient forum, [Datamize] has proceeded to  
12          preserve its rights by filing the attached Complaint in the United  
13          States District Court for the District of Montana (Missoula  
14          Division) where Datamize is located." Doc #1, Ec at 2. To  
15          demonstrate further that Plumtree would soon be infringing the '040  
16          patent, Datamize also enclosed the thirty-eight allowed claims later  
17          issued as the '040 patent on October 1, 2002.

18          On November 23, 2002, Magistrate Judge Leif Erickson of  
19          the district court in Missoula issued a report and recommendation  
20          that the Montana action be dismissed for lack of personal  
21          jurisdiction over Plumtree. In response to Magistrate Judge  
22          Erickson's report and recommendation, on December 4, 2002, Plumtree  
23          filed suit in this court seeking a declaratory judgment for non-  
24          infringement of the '137 patent ("DJ1"). DJ1 was assigned to the  
25          undersigned. Plumtree agreed to stay DJ1 pending a ruling by a  
26          Montana district judge on the personal jurisdiction issue. On July  
27          8, 2003, Judge Donald Molloy adopted Magistrate Judge Erickson's  
28          findings and dismissed the Montana action for lack of personal  
            jurisdiction. On August 7, 2003, Datamize filed a motion to realign  
            itself as plaintiff in DJ1. The court granted realignment on  
            October 6, 2003.

1 On September 3, 2003, Datamize filed a patent infringement  
2 claim against nine online security brokerage firms in the Eastern  
3 District of Texas, Marshall Division, based on the '040 patent ("TX  
4 action"). On April 15, 2004, Datamize moved to add additional  
5 infringement claims in the TX action based on the '418 patent, which  
6 issued on December 2, 2003. The judge in the TX action subsequently  
7 allowed Datamize to add these additional claims. Plumtree, however,  
8 was not a defendant in the TX action. The parties inform the court  
9 that the TX action was resolved in 2005. Doc #63 at 3.

10 On March 31, 2004, Plumtree filed a motion for summary  
11 judgment in DJ1 claiming that the '137 patent was indefinite. On  
12 July 9, 2004, the court granted Plumtree's motion. On August 5,  
13 2005, the Federal Circuit affirmed the court's grant of summary  
14 judgment in favor of Plumtree.

15 On the same day that this court granted Plumtree's motion  
16 for summary judgment in DJ1, Plumtree filed this action ("DJ2").

## 17 II

18 The construction of patent claims is a question of law to  
19 be determined by the court. Markman v Westview Instruments, Inc.,  
20 517 US 370, 372 (1996). The goal of claim construction is "to  
21 interpret what the patentee meant by a particular term or phrase in  
22 a claim." Renishaw PLC v Marposs Societa per Azioni, 158 F3d 1243,  
23 1249 (Fed Cir 1998). "[T]he claims define the scope of the right to  
24 exclude; the claim construction inquiry, therefore, begins and ends  
25 in all cases with the actual words of the claim." *Id* at 1248. The  
26 court may, if necessary, consult a variety of sources to determine  
27 the meaning of a claim term, including "the words of the claims  
28

1 themselves, the remainder of the specification, the prosecution  
2 history and extrinsic evidence concerning relevant scientific  
3 principles, the meaning of technical terms and the state of the  
4 art." Innova/Pure Water, Inc v Safari Water Filtration Systems,  
5 Inc, 381 F3d 1111, 1116 (Fed Cir 2004). Also, the words of a claim  
6 "'are generally given their ordinary and customary meaning.'" Phillips v AWH Corp, 415 F3d 1303, 1312 (Fed Cir 2005) (citing  
7 Vitronics Corp v Conceptronic, Inc, 90 F3d 1576, 1582 (Fed Cir  
8 1996)). "The ordinary and customary meaning of a claim term is the  
9 meaning that the term would have to a person of ordinary skill in  
10 the art in question at the time of the invention, i e, as of the  
11 effective filing date of the patent application." Id at 1313. See  
12 also Brookhill-Wilk 1, LLC v Intuitive Surgical, Inc, 326 F3d 1215,  
13 1220 (Fed Cir 2003).

14  
15 With these legal principles in mind, the court construes  
16 the disputed claim language of the patents.

17  
18 1. "Kiosk"

19 This term is located in claims 1-3, 5-13, 15, 16 and 27-29  
20 of the '040 patent. The parties dispute whether this term should be  
21 construed with the limitation that the computer delivery system be  
22 "generally accessible to some segment of the public." Doc #66 at 6,  
23 Doc #70 at 5. Datamize argues that "kiosk" refers to any stand-  
24 alone computer station "having a display screen and some form of  
25 input device." To support its definition, Datamize argues that the  
26 term "kiosk" is "used in a 'broad sense to include stand-alone  
27 kiosks as well as general purpose computers configured to serve the  
28 same functions as a stand-alone kiosk.'" Doc #66 at 6. Plumtree

1 argues that the term "kiosk" should be limited to include only  
2 computer delivery systems that are "generally accessible to some  
3 segment of the public." Plumtree cites language from the patent  
4 stating, "An electronic kiosk refers to a computer-based information  
5 delivery system generally accessible to some segment of the public  
6 for retrieving information or initiating transactions." '040 patent  
7 at 1:17-20. For the reasons given below, the court construes  
8 "kiosk" as "a computer-based interactive system that delivers  
9 information to a user in order to allow the user to make selections  
10 or initiate transactions."

11 Plumtree's proposed construction is problematic because  
12 the claim language does not require a kiosk to be "generally  
13 accessible to the public." While it is true that the kiosks most  
14 often are used to display and gather information in public areas, a  
15 kiosk does not cease to be a kiosk if it is placed in an area that  
16 is not generally accessible to the public - a point Datamize  
17 persuasively argued at the August 3 hearing. The words "generally  
18 accessible to some segment of the public" only describe a typical  
19 use of the kiosk, and in no way limit or require that the invention  
20 be accessible to a segment of the public. Plumtree argues that the  
21 '040 patent "teaches that kiosks may be found in a number of public  
22 settings such as 'museums, and exhibitions, airports, public  
23 transportation stations, banks \* \* \*." Doc #70 at 6. As Datamize  
24 correctly points out, however, the claim language clearly states  
25 that the kiosk "may" be found in those locations, not that the kiosk  
26 "must be" or "is" found at those locations.

27 Datamize's proposed construction of a "general purpose  
28 computer or a stand-alone station having a display screen and some

1 form of input device" is also problematic because it is too broad.  
2 If Datamize's proposed construction were accepted, there would be  
3 little difference between a kiosk and a standard, general purpose  
4 computer. A typical computer workstation has a display screen and  
5 one or more input devices. A kiosk is a more specialized version of  
6 a standard computer and therefore should have narrower  
7 specifications. The claims describe an interactive system that can  
8 deliver information to a user in order to make selections. For  
9 example, in claim 1, the language states that the invention is to  
10 present "customized assortments of said information \* \* \* [which  
11 enable] a kiosk user to select one or more screen elements." '040  
12 patent at 20:7-27.

13 Accordingly, the court finds that the function of a kiosk  
14 is information retrieval and delivery, and construes "kiosk" as "a  
15 computer-based interactive system that delivers information to a  
16 user in order to allow the user to make selections or initiate  
17 transactions."

## 18 19 2. "Computer"

20 This term is located in claims 14 and 30 of the '040  
21 patent and in all claims of the '418 patent. Doc #70 at 7.  
22 Plumtree proposes "a general purpose computer configured to serve  
23 the same function as a kiosk." Doc #70 at 7. Datamize contends  
24 that "computer" as used in the patents does not need to be  
25 construed. Datamize also states that "[i]f the court agrees that  
26 the function of a kiosk is retrieving information or initiating a  
27 transaction, then Datamize does not object to Plumtree's proposed  
28 construction of 'computer.'" Doc #75 at 7. Because "computer" is a



1 term well-known by persons of ordinary skill in the art, the court  
2 declines to construe it at this time.

3  
4 3. "[W]herein at least one of said screen elements permits limited  
5 variation in its on-screen characteristics in conformity with a  
desired uniform look and feel" ('040 all claims)

6 "[S]aid screen elements having on-screen characteristics \* \* \*  
7 providing a generally uniform look and feel with other interface  
screens of said plurality of computers" ('418 all claims)

8         Datamize proposes that both of these clauses be  
9 interpreted as "a degree of variation in [the kiosk's] on-screen  
10 characteristics sufficiently limited to ensure that a user can  
11 create customized screens that are generally uniform." Doc #75 at  
12 8. Plumtree argues that the clause in the '040 patent should be  
13 construed as "[t]he limited variation ensures that the resulting  
14 interface screens have a look and feel that must be both desired and  
15 uniform," and that the clause in the '418 patent should be construed  
16 as "[t]he interface screens for all computers in the system all have  
17 a 'generally uniform look and feel.'" Doc #70 at 9. Plumtree also  
18 contends that the terms "limited variation" and "desired uniform  
19 look and feel" are indefinite. Id. Plumtree argues further, in its  
20 motion for summary judgment, that because the terms are indefinite,  
21 the patents should be declared invalid. See Doc #72. The court  
22 addresses the terms "limited variation" and "uniform look and feel"  
23 in turn, followed by each of the two clauses.

24  
25 a. "limited variation"

26         The term "limited variation" appears in the '040 patent.  
27 Datamize argues that this term should be construed as "a degree of  
28 variation [of] on-screen characteristics sufficiently limited \* \*

1 \*." Doc #75 at 8. Plumtree argues, in its motion for summary  
2 judgment, that the term is indefinite because it is vague and offers  
3 no guidance in determining whether something falls in or out of the  
4 boundaries set by the term "limited."

5 As recognized by both parties, "limited variation" is not  
6 a technical term, but a term of general usage. Doc #72 at 11; Doc  
7 #77 at 14. As stated above, words of a claim are generally given  
8 their ordinary and customary meaning. See Phillips, 415 F3d at  
9 1312. Plumtree argues that Semmler v American Honda Motor Co, 990  
10 F Supp 967, 975 (SD Ohio 1997) and Amgen, Inc v Chugai  
11 Pharmaceuticals Co, 927 F2d 1200 (Fed Cir 1991) support the argument  
12 that "limited" is too vague. Doc #77 at 15. In Semmler, the term  
13 in dispute was "considerable fuel savings." See Semmler, 990 F Supp  
14 at 967. In Amgen, the dispute centered on the word "about" in the  
15 term "about 160,000 IU/AU." See Amgen, 927 F2d at 1200. In both of  
16 these cases, the terms were found to be indefinite. Plumtree argues  
17 that "limited" falls into the same category as the terms "about" and  
18 "considerable" because there is a lack of precise guidance on when  
19 exactly the variations fall outside the boundaries of "limited."  
20 The court disagrees.

21 In Playtex Products, Inc v Proctor & Gamble, Co, 400 F3d  
22 901, 907 (Fed Cir 2005), the Federal Circuit declined to impose a  
23 numerical, or precise constraint on the term "substantially uniform  
24 thickness." Id. The court also restated its holding from a prior  
25 case that "'words of approximation, such as 'generally' and  
26 'substantially,' are descriptive terms 'commonly used in patent  
27 claims to avoid a strict numerical boundary to the specified  
28 parameters.'" Id (citing Anchor Wall Sys v Rockwood Retaining

1 Walls, Inc, 340 F3d 1298, 1311 (Fed Cir 2003)). Additionally, in  
2 Verve, LLC v Crane Cams, Inc, 311 F3d 1116, 1120 (Fed Cir 2002), the  
3 Federal Circuit held that claim language that accommodates minor  
4 variations is not indefinite. See also Ecolab, Inc v Envirochem,  
5 Inc, 265 F3d 1358, 1366 (Fed Cir 2001).

6 Here, the term "limited" is not unlike terms such as  
7 "generally" and "substantially." Both "generally" and  
8 "substantially" serve to create approximate boundaries, much in the  
9 same way that "limited" does. If the clause had instead stated "at  
10 least one of said screen elements permits *substantial* variation in  
11 its on-screen characteristics \* \* \*," Playtex and Anchor Wall would  
12 permit the clause, despite the lack of precise constraints. Since  
13 there is little difference in the function of the words  
14 "substantial" and "limited" as a boundary, the court does not find  
15 the term indefinite, and construes "limited variation" according to  
16 its plain and ordinary meaning. Accordingly, the court finds  
17 "limited variation" to mean a "degree of variation of on-screen  
18 characteristics sufficiently limited."

19  
20 b. "uniform look and feel"

21 The term "uniform look and feel" appears in both the  
22 disputed clauses of the '040 and '418 patents. Datamize argues that  
23 the term "look and feel" is a collection, or set of on-screen  
24 characteristics that creates a certain style. See Doc #66 at 8-9.  
25 Plumtree argues in its motion for summary judgment that the term is  
26 vague and subjective. Doc #72 at 6.

27 Plumtree contends that the term "uniform look and feel"  
28 has several problems. First, it contends that the term "look and

1 feel" is vague because, "[t]wo people may have different opinions as  
2 to what are the significant aspects of an interface screen that  
3 constitute its 'appearance and functionality.'" Id. Plumtree  
4 argues that the term is inexact, and therefore problematic. Id.  
5 Second, Plumtree maintains that the term "uniform" is also  
6 problematic because "the claim requires a comparison between  
7 different interface screens to determine whether they have the same  
8 'look and feel,'" and that this comparison "is inherently  
9 subjective" because the patents "provide no objective standard for  
10 [determining] whether the 'look and feel' of different interface  
11 screens is 'uniform.'" Id.

12 With respect to the term "uniform," the court is guided by  
13 Cordis Corp v Medtronic AVE, Inc, 339 F3d 1352 (Fed Cir 2003). In  
14 Cordis, the disputed claim term was "substantially uniform  
15 thickness." Id at 1360. The Federal Circuit addressed the term and  
16 held that it did not require a numerical restriction on the  
17 "substantially uniform" limitation. Id at 1362. Notably, the  
18 Federal Circuit allowed the term to be construed, raising no  
19 objection that "uniform" was vague or indefinite. Similarly, in  
20 Ecolab, 265 F3d at 1366, the Federal Circuit held that the term  
21 "substantially uniform" was not indefinite. Based on the fact that  
22 the Federal Circuit scrutinized a term with the word "uniform" (at  
23 least twice) and made no objections to the word, this court finds  
24 that the term "uniform" in "uniform look and feel" does not render  
25 the claim indefinite.

26 Plumtree's argument that the term "look and feel" is  
27 subjective is also unpersuasive. As Datamize argues in its response  
28 to Plumtree's summary judgment motion, the "look and feel" of a

1 screen is defined by the specifications. Doc #77 at 10. The "look  
2 and feel" of the resulting screens are outputs of a program. One  
3 can look to the source code to see what elements, along with their  
4 positions on the screen, constitute a given output. It follows that  
5 these elements and their positions and functions are what give the  
6 resulting screen its "look and feel." These characteristics can  
7 easily be determined. Accordingly, the term "look and feel" is not  
8 indefinite.

9 Furthermore, as stated above, the ordinary and customary  
10 meaning of a claim term is the meaning that the term would have to a  
11 person of ordinary skill in the art. Phillips, 415 F3d at 1313.  
12 The term "look and feel" is a term that is readily known and  
13 recognized by a person of ordinary skill involved in software use  
14 and development. The court finds persuasive Datamize's response,  
15 which points out that Plumtree itself distributes literature that  
16 uses the term "look and feel" in connection with Plumtree products.  
17 Doc #77 at 19-22.

18 Having found that the terms "limited variation" and  
19 "uniform look and feel" are not indefinite, the court now addresses  
20 the proper construction for the two disputed clauses. Because the  
21 language of the two clauses contain no technical terms, but only  
22 terms of general usage, the court adopts a construction that is in  
23 line with the plain and ordinary meaning of the words. The proposed  
24 construction by Datamize meets this standard, and so the court  
25 adopts this construction - "a degree of variation in its on-screen  
26 characteristics sufficiently limited to ensure that a user can  
27 create customized screens that are generally uniform" - for both  
28 clauses.

1  
2 4. "Element(s)" ('040 and '418 patents)

3 This term is located in both the '040 and the '418  
4 patents. Datamize's proposed construction is "a window; a  
5 background image or artwork for providing a backdrop for a window or  
6 for background within a window; a button; a hot spot or area on the  
7 screen for activating actions, a test string; a video clip; an audio  
8 clip; a slide sequence; an animation sequence; or NAV object." Doc  
9 #66 at 11. Plumtree proposes that "element" be construed as "an  
10 item that appears on an interface screen (such as a button)." Doc  
11 #70 at 11.

12 Datamize argues that "element" should be construed "as  
13 explicitly defined in the specification." Doc #66 at 11. Datamize  
14 cites claim language which states, in relevant part:

15 [A] given screen will include a variety of elements for  
16 presentation to a user such as one or more windows, one or  
17 more background images or artwork for providing a backdrop  
18 for a window or for background within a window, a number  
of buttons; a number of 'hot spots,' ie, areas on a screen  
for activating actions, text strings, video clips, audio  
clips, slide sequences, or animation sequences.

19 '040 patent at 6:21-28, Doc #66 at 11. As Plumtree correctly points  
20 out, the cited language only gives examples of what an element could  
21 be. The claim language neither restricts nor limits "element" to  
22 the listed examples. Because there is no intrinsic evidence that  
23 limits or restricts the term to the uses cited by Datamize, the  
24 court adopts a definition more in line with the plain meaning of the  
25 word, and construes "element" as "a visual or audio item presented  
26 to the user."

27 \\  
28 \\  
14

1 5. "Kiosk user," "computer user," "user at an individual computer."  
2 ('040 patent).

3 The term "kiosk user" is found in claims 1-3, 5-13, 15,  
4 16, 27 and 30 of the '040 patent. Doc #66 at 12. The term  
5 "computer user" is found in claim 30 of the '040 patent. Id. The  
6 term "user at an individual computer" is found in claims 14 through  
7 26 of the '040 patent. Id. Plumtree proposes all three of the  
8 terms to mean "[t]he end-user of a kiosk/computer." Datamize argues  
9 that these terms do not need to be construed. If they are to be  
10 construed, Datamize proposes that "kiosk user" and "computer user"  
11 be construed as a "user of a kiosk/computer," and that "user at an  
12 individual computer" be construed as "an end-user of a  
13 kiosk/computer." For the reasons stated below, the court declines  
14 to construe the terms.

15 The dispute, or confusion, over the term "user" arises  
16 because the patentee has used the word "user" to refer to both the  
17 person using the patented invention to create the kiosk systems and  
18 the person using the kiosk. For example, claim 14 of the '040  
19 patent states, in part:

20 [E]nabling a user at an individual computer of said  
21 plurality to select one or more screen elements from said  
22 predefined screen element plurality and to select on-  
screen characteristics of said at least one screen element  
permitting limited variation in its on-screen  
characteristics \* \* \*.

23 '040 patent at 21:41-46. Here, the word "user" is used to refer to  
24 a person that is using the invented method of creating screens for  
25 kiosk systems. In contrast, claim 27 of the '040 includes the word  
26 "user" to refer to the end-user of the kiosk system, stating that  
27 the interface screen "will have a uniform look and feel and be  
28

1 functionally operable for effective delivery of information to a  
2 kiosk user." '040 patent at 23:7-10.

3           Datamize contends that the phrases "kiosk user," "computer  
4 user," and "user at an individual computer" do not have any special  
5 definitions and argues that there is no basis for Plumtree's  
6 assertion that all three of the phrases have to mean the same thing  
7 (ie "the end-user of kiosk/computer"). Doc #75 at 10. Plumtree  
8 argues that the term "kiosk user" and "computer user" must mean the  
9 same thing throughout the patent. Plumtree cites Fin Control  
10 Systems Pty v OAM, Inc, 265 F3d 1311, 1318 (Fed Cir 2001) and Omega  
11 Engineering, Inc v Raytek Corp, 334 F3d 1314, 1334 (Fed Cir 2003) to  
12 support its argument that unless otherwise stated, the same claim  
13 term in the same patent carries the same meaning. Doc #70 at 13.  
14 Plumtree argues that there is "no evidence \* \* \* that the patentee  
15 intended 'user' to mean both 'end-user' and 'system author.'" Id.  
16 This argument fails, however, because the patent language explicitly  
17 uses the word "user" to refer to both the user of the kiosk and the  
18 user of the kiosk-designing system. There is no reason here why the  
19 term "user" cannot refer to both groups. Restricting and confining  
20 the term "user" to just one construction would be akin to saying  
21 that the word "maker" could not apply to both a person making  
22 carpentry tools, and a person who uses the tools to make tables. Of  
23 course, a patentee can certainly limit, or even change, the meaning  
24 of a common word, but that is not the case here.

25           Moreover, the use of the term "user" to refer to both  
26 groups of people does no violence to the plain and ordinary meaning  
27 of the word, nor does it stretch the intentions of the patentee at  
28



1 the time that the patent was filed. See Phillips, 415 F3d at 1312-  
2 13.

3 Accordingly, the court declines to construe the terms  
4 "kiosk user," "computer user," and "user at an individual computer."

5  
6 6. "Master database" ('040 patent)

7 The term "master database" is found in claims 27-30 of the  
8 '040 patent. Datamize proposes "database" to mean "an organized  
9 collection of data," and a "master database" to mean "a controlling  
10 database." Doc #66 at 14. Plumtree's proposed construction for  
11 "master database" is "[a] collection of information containing all  
12 or substantially all of the information content that can be  
13 displayed on any kiosk in the kiosk system." Doc #70 at 13. The  
14 actual claim language states, in part:

15 \* \* \* providing a master database of information from said  
16 plurality of information providers, said master database  
17 referencing information content from said providers to be  
displayed on any of said plurality of kiosks \* \* \*

18 '040 patent at 22:44-47.

19 The court fails to see how Datamize's construction,  
20 "controlling database," is an adequate definition. Datamize does  
21 not explain exactly what it is that the "master database" is  
22 controlling. In its opening brief, Datamize states, "the master  
23 database of the '040 patent is a controlling database, referencing  
24 or containing the information content that may potentially be used  
25 throughout the kiosk system." Doc #66 at 15. Yet, neither Datamize  
26 nor the claim language make any reference to anything being  
27 controlled by the "master database." In fact, there is no mention  
28

1 in the patent language of any kiosk system having more than one  
2 database.

3           The patent language describes a "master database" as a  
4 collection of information from which the kiosk system can pull up  
5 information to be displayed on its screens. '040 patent at 22:44-  
6 47. This database can reside on a remote server, where information  
7 retrieval by the individual kiosks would take place over a network,  
8 or it can reside on the kiosk system itself. '040 patent at 4:65-  
9 5:3; 19:31-34. In either case, the database would contain all of  
10 the information necessary for the kiosk system, supporting  
11 Plumtree's construction.

12           Plumtree's proposed construction is also supported by the  
13 prosecution history of the '137 patent and the specification of the  
14 '040 patent. During the prosecution of the '137 patent, Datamize  
15 attempted to distinguish certain of its pending claims from the  
16 Consolatti patent by requiring that those claims include the step of  
17 "providing a master database of information." Consollati discloses  
18 an authoring tool for creating computer interface screens. Doc #71,  
19 Ex A at 2:43-45. According to Datamize:

20           The present invention relies on a database that is  
21 integral to the authoring system and that had no  
22 counterpart in Consolatti. The database contains all, or  
23 at least substantially all, the information content needed  
24 for all the kiosks of the system. The present invention  
25 defines interface screens in part by executing queries in  
26 the database to achieve such tasks as determining how many  
27 buttons are needed on certain interface screens to access  
28 information content and associating items of information  
content with button actions.

Doc #71, Ex B at 6. Plumtree's construction of "master database"  
incorporates the very words used by Datamize to distinguish  
Consolatti. "When multiple patents derive from the same initial  
application, the prosecution history regarding a claim limitation in

1 any patent that has issued applies with equal force to subsequently  
2 issued patents that contain the same claim limitation." Biovail  
3 Corp Intern v Andrx Pharmaceuticals, Inc, 239 F3d 1297, 1301 (Fed  
4 Cir 2001) (citing Jonsson v The Stanley Works, 903 F2d 812, 817-18,  
5 14 USPQ2d 1863, 1868 (Fed Cir 1990)).

6 Moreover, the specification of the '040 patent explicitly  
7 states "[t]o implement the kiosk system, a database of all  
8 information to be displayed at any individual kiosk is constructed."  
9 '040 patent at 14:23-25. The specification then indicates that the  
10 system need not include a central database server but may simply  
11 have each kiosk of the system store the entire database of  
12 information available to kiosks in the system (i e, the master  
13 database). '040 patent at 4:60-5:3, 19:31-58. This would not be  
14 feasible if the master database did not contain the entirety of the  
15 information needed for the kiosk system, but merely referenced  
16 information contained in other databases.

17 Finally, Plumtree's construction is more in line with the  
18 plain and ordinary meaning of the term "master database," and closer  
19 to the meaning it would have to a person of ordinary skill in the  
20 art. A person familiar with the technology described in these  
21 patents would take "master database" to mean a database that  
22 contains all of the information required by the system.

23 Accordingly, the court adopts Plumtree's proposed  
24 construction and construes the term "master database" as "a  
25 collection of information containing all or substantially all of the  
26 information content that can be presented on any kiosk in the kiosk  
27 system."  
28

1 7. "Object" ('418 patent)

2 The term "object" appears numerous times in the '418  
3 patent. Datamize proposes that an "object" is "an instance of data  
4 derived from an associated object oriented program." Doc #70 at 14.  
5 Plumtree proposes "object" to mean "an item appearing on a display  
6 screen that can be individually selected and manipulated." Id. For  
7 the reasons given below, the court declines to construe the term  
8 "object."

9 Plumtree argues that adopting Datamize's proposed  
10 construction would be "import[ing] the extraneous notion of object-  
11 oriented programming." Doc #70 at 15. Plumtree contends that there  
12 is "no intrinsic evidence that would suggest that 'object' can only  
13 be 'an instance of data derived from an associated object oriented  
14 program'" and that "object" should be construed in a similar fashion  
15 as "element." Id. Datamize argues, however, that the term "object"  
16 is used by the patentee in the same manner as it is commonly used in  
17 object oriented programming. Doc #75 at 12.

18 "In construing patent claims, the court must apply the  
19 same understanding as that of persons knowledgeable in the field of  
20 the invention. 'Patents are written not for laymen, but for and by  
21 persons experienced in the field of the invention.'" Merck and Co v  
22 Teva Pharmaceuticals USA, Inc, 347 F3d 1367, 1370 (Fed Cir 2003)  
23 (citing Voice Techs Group, Inc v VMC Sys, Inc, 164 F3d 605, 615 (Fed  
24 Cir 1999)). Here, a person of ordinary knowledge and skill in the  
25 art would know that the patentee was using the term "object" as it  
26 is used in object oriented programming. In object oriented  
27 programming, an "object" is an instance of a class. A class is a  
28 combination of definitions for different characteristics. An object

1 is the embodiment of particular versions of the different  
2 characteristics. The claim language clearly indicates that the  
3 patentee had this usage in mind in using the term. In both the '040  
4 and the '418 patents, the language states that "[t]he authoring  
5 system uses the methods of object oriented programming. The system  
6 is specified by the following Object Class Definition Tables." '040  
7 patent at 6:37-40; '418 patent at 6:40-42. The claim language also  
8 shows that the patentee used the term "object" in the same manner  
9 that he used the term "element." For example, the specifications  
10 state: "\* \* \* [the] item can be removed from the definition table  
11 and the affected interface screen re-defined to remove any buttons  
12 or other objects that may have been associated with the sold-out  
13 item." '418 patent at 21:39-42.

14 Accordingly, the court declines to construe the term at  
15 this time and leaves it to be determined by its context as it  
16 appears in the claim language.

17  
18 8. Whether claims 24 and 36 of the '418 patent are method or  
apparatus claims

19 Plumtree argues that claims 24 and 36 of the '418 patent  
20 are method claims. Doc #70 at 15. Datamize contends that the two  
21 claims are apparatus claims. Doc #75 at 13.

22 A method claim recites a series of steps or actions, while  
23 an apparatus claim recites a tangible item. See In re Kollar, 286  
24 F3d 1326, 1332 (Fed Cir 2002).

25 Claim 24 of the '418 patent states, in part:

26 A computer program storage medium readable by a computing  
27 system and encoding a computer program for executing a  
28 computer process for providing customized assortment of  
information content from a plurality of information

1 providers for display in one or more customized interface  
2 screens in a plurality of computers \* \* \*

3 '418 patent at 24:5-10. Claim 36 of the '418 patent states, in  
4 part:

5 A computer program storage medium readable by a computing  
6 system and encoding a computer program for executing a  
7 computer process for providing customized assortment of  
8 information content from a plurality of information  
9 providers for display in one or more customized interface  
10 screens in a plurality of computers, the computer process  
11 comprising:

12 enabling selection of said a customized assortment of  
13 information content for a first computer of said  
14 plurality from information content from said plurality of  
15 information providers \* \* \*

16 '418 patent at 25:14-23.

17 Plumtree argues that these claims are method claims  
18 because the claim language seems to describe a process, or a series  
19 of steps that are performed by the invention. Doc #70 at 15. In  
20 the alternative, Plumtree argues that the claims are indefinite  
21 because they contain characteristics of "both a method \* \* \* and an  
22 apparatus." Id. Plumtree cites IPXL Holdings, LLC v Amazon, Inc,  
23 430 F3d 1377, 1384 (Fed Cir 2005) to support its argument that such  
24 claims should be declared invalid for indefiniteness. Id. Datamize  
25 contends, however, that the claim language is not indefinite, and  
26 that the claims are apparatus claims. Datamize points to the claim  
27 language stating "[a] computer program storage medium" to support  
28 its argument that these claims describe a tangible item and are  
therefore apparatus claims. Doc #75 at 13.

The court first notes that the claims are not models of  
clarity. The claims start out describing a tangible item ("computer  
program storage medium"). As Datamize points out, all examples of

1 computer program storage media, like floppy disks, CDs or DVDs, are  
2 tangible items. Doc #75 at 13. If the claim language ended there,  
3 there would be no dispute that the claims are apparatus claims. The  
4 claim language continues, however, and in so doing, also appears to  
5 describe a process:

6 \* \* \* encoding a computer program for executing a  
7 computer process for providing customized assortment of  
8 information content from a plurality of information  
9 providers for display in one or more customized  
10 interface screens in a plurality of computers, the  
11 computer process comprising:

12 enabling selection of said a customized assortment of  
13 information content for a first computer of said  
14 plurality from information content from said plurality  
15 of information providers \* \* \*

16 '418 patent at 25:14-23.

17 From the court's perspective, the claim language describes  
18 a tangible item that stores a program. Thus the claims appear to be  
19 apparatus claims. The claim language also describes the design and  
20 the function of the program that is stored on the tangible item.  
21 Given the process described by the claim language, these claims  
22 appear simultaneously to state method claims, making them so-called  
23 "hybrid" claims. See Claim Construction in the Federal Circuit  
24 (Thomson West 2006) at 55-57.

25 Plumtree contends that such claims are invalid for  
26 indefiniteness, citing IPXL Holdings, 430 F3d 1377 (Fed Cir 2005).  
27 In IPXL Holdings, the disputed claim described a "system," but also  
28 included steps on how a user might use that system. 430 F3d at  
1384. The Federal Circuit held that it was unclear whether  
"infringement occurred when one creates the system \* \* \* or whether  
infringement occurs when the user actually uses the [system]." Id.  
This ruling, however, is unclear in its application to the present

1 case. The ruling does not state whether any claim that contains  
2 both method and apparatus descriptions is ipso facto invalid for  
3 indefiniteness. It merely states that such language is problematic  
4 if it does not adequately inform the public of where infringement  
5 occurs.

6 The Federal Circuit has held that "process steps can be  
7 treated as part of a product claim if the patentee has made clear  
8 that the process steps are an essential part of the claimed  
9 invention." Andersen Corp v Fiber Composites, LLC, 474 F3d 1361,  
10 1375 (Fed Cir 2007). Here, it is clear that the process steps are  
11 an essential part of the claim. The claim language describes in  
12 great detail the program, or the process, that is to be stored on  
13 the "computer program storage medium." The storage medium takes its  
14 character from its function and capacity to store a program that  
15 carries out these precise steps. See also Sandisk Corp v Memorex  
16 Products, Inc, 415 F3d 1278 (Fed Cir 2005) (Court dealt with method  
17 claim having a significant preamble setting forth apparatus features  
18 of a computer system in which the claimed method is practiced).

19 Collaboration Properties, Inc v Tandberg ASA, 2006 WL  
20 1752140 (ND Cal) is also instructive. In Tandberg, Judge Patel, of  
21 this district, found that IPXL Holdings stood for the narrow rule  
22 that a single claim "may not purport to cover a system, independent  
23 of any use of the system, and simultaneously purport to cover a  
24 particular use of the system." *Id* at 7. That is not the case here.  
25 The claim language describes a tangible item that is defined by  
26 certain steps, essential to the claimed invention.

27 Accordingly, the court finds that claims 24 and 36 are  
28 apparatus claims.



## III

## A

The court turns to Plumtree's motion for summary judgment. Doc #72. The summary judgment standard is the same in a patent case as in any other case. Union Carbide Corp v American Can Co, 724 F2d 1567, 1571 (Fed Cir 1984). In deciding a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v Liberty Lobby, Inc, 477 US 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

The burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Calderone v United States, 799 F2d 254, 258-59 (6th Cir 1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

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B

Plumtree requests summary judgment "that the '040 and the '418 patent claims are invalid on the ground that, as a matter of law, the terms 'limited variation' and 'desired uniform look and feel' of the '040 patent, and 'pre-defined constraints' and 'generally uniform look and feel' of the '418 patent are indefinite under 35 USC § 112, ¶2." Doc #72 at 1.

Every patent's specification must "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 USC 112 ¶2 (2000). "Because the claims perform the fundamental function of delineating the scope of the invention, the purpose of the definiteness requirement is to ensure that the claims delineate the scope of the invention \* \* \*" Datamize, LLC v Plumtree Software, Inc, 417 F3d 1342, 1347 (Fed Cir 2005) (internal citations omitted). "The definiteness requirement, however, does not compel absolute clarity. Only claims 'not amenable' to construction' or 'insolubly ambiguous' are indefinite. \* \* \* Furthermore, a difficult issue of claim construction does not ipso facto result in a holding of indefiniteness." Id. "If the meaning of the claim is discernable, even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree, we have held the claim sufficiently clear to avoid invalidity on indefiniteness grounds." Exxon Research & Eng'g v United States, 265 F3d 1371, 1375 (Fed Cir 2001). The courts are required to "accord respect to the statutory presumption of validity, and [] protect the inventive contribution of patentees, even when the drafting of their patents has been less than ideal." Id at 1374-75.

1 In doing so, the court follows "the requirement that clear and  
2 convincing evidence be shown to invalidate a patent." Datamize, 417  
3 F3d at 1348. See also Budde v Harley-Davidson, Inc, 250 F3d 1369,  
4 1376 (Fed Cir 2001).

5 1

6 Plumtree's first argument is that the term "uniform look  
7 and feel" is indefinite. Doc #72 at 6. Plumtree argues that  
8 "uniform look and feel" is subjective, and that the intrinsic  
9 evidence does not "save" "uniform look and feel." Doc #72 at 7.  
10 Plumtree also argues that Datamize has conceded that "uniform look  
11 and feel" is subjective, and that Datamize's proposed construction  
12 is also subjective. Doc #72 at 10.

13 As stated above, the court finds that the term "uniform  
14 look and feel" is not indefinite. It is too late in the day of  
15 computer-related terminology to find that "look and feel" does not  
16 have a well understood meaning in that particular field. See Apple  
17 Computer, Inc v Microsoft Corp, 35 F3d 1435, 1439 (9th Cir 1994)  
18 (Graphical user interfaces "are thought of as the 'look and feel' of  
19 a computer"). Plumtree's argument that the term "uniform" is  
20 subjective, and therefore indefinite, is unpersuasive. "Uniform"  
21 has been addressed by the Federal Circuit and upheld. The Federal  
22 Circuit has looked at the term "uniform" in a similar context, and  
23 did not find it to be vague, overly subjective or indefinite. See  
24 Cordis, 339 F3d at 1360; see also Ecolab, 265 F3d at 1366. The term  
25 "look and feel" is subject to a reasonable construction because the  
26 specification of the system contains the requisite definitions to  
27 notify others of the elements and components that constitute "look  
28 and feel."

2

Plumtree also argues that the term "limited variation" is indefinite. Doc #72 at 11. Plumtree contends that the intrinsic evidence does not save "limited variation" and that neither the specifications nor the prosecution history provide helpful guidance. Id. Finally, Plumtree argues that the existing case law supports the argument that "limited variation" is indefinite.

As the court discussed above, the term "limited variation" is not indefinite. The term "limited" serves to create a boundary to the amount of variation allowed and/or required by the claim. The Federal Circuit has upheld use of such words in other cases. See Playtex, 400 F3d at 907. Because the term "limited variation" is a term of general usage, the court is not hampered by the absence of intrinsic evidence or prosecution history, and adopts the plain meaning.

3

Lastly, Plumtree argues that the term "predefined constraints" is indefinite. Doc #72 at 13. Plumtree contends that the claim language provides no guidance on "how constrained the choices [in creating the screens] should be." Id. The court finds no basis for this argument.

The relevant claim language states, "\* \* \* said screen elements having on-screen characteristics subject to pre-defined constraints providing a generally uniform look and feel with other interface screens of said plurality of computers." '418 patent at 22:28-31. As the language shows, the term "predefined constraint" means a boundary that is set in advance, either by the system or by

1 the system designer, for a particular screen element. Accordingly,  
2 the language is not indefinite.

4 IV

5 In sum, the court has construed or clarified the  
6 construction of the disputed terms of the '040 and '418 patents  
7 according to the patents' plain language, the intrinsic record and  
8 the Federal Circuit's guidance. Notwithstanding any further orders  
9 the court may make regarding claim construction, this order shall be  
10 deemed to be the "claim construction order" for scheduling purposes.

11 Finally, for the reasons above, Plumtree's motion for  
12 summary judgment (Doc #72) is DENIED. Datamize's motion to  
13 supplement the record in opposition to summary judgment (Doc #85) is  
14 DENIED AS MOOT.

15  
16 SO ORDERED.

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19 VAUGHN R WALKER

20 United States District Chief Judge  
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**United States District Court**  
For the Northern District of California

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